Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EDWARD JOHN SKEENS,

Petitioner,

v.

WILLIAM D. MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Whether a Judge is immune from a civil suit for money damages when he has a practicing attorney taken forcibly from his law office and imprisoned without a warrant depriving him of his liberty without due process of law in violation of his rights guaranteed by the Maryland and Federal Constitution?

2. Whether the absolving principle of "wrongful conduct in excess of the court's jurisdiction" should be applicable upon the issue of absolute judical immunity when an individual's due process rights are violated by seizing his body without a warrant based upon oath or affirmation and being deprived of his personal liberty by imprisonment without any right to bail as guaranteed by the Federal Constitution and Maryland's Declaration of Rights?

3. Whether this cause should be remanded to the Maryland Court of Appeals for review of these issues of their first impression under Maryland Law as being desirable and in the public interest?

PARTIES

The Petitioner is a practicing attorney for over 42 years and admitted to the Bar of this Court on October 4, 1954 (Bar No. 29249) and brings this action in his own right as an aggrieved party.

Plaintiff-Appellant

The Respondent is a sitting judge on the Circuit Court for Prince George's County, Maryland, the highest ranked trial court in this jurisdiction.

Defendant-Appellee

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OPINIONS BELOW

The Order of the Court of Appeals of Maryland dated October 19, 1994, and entered by Robert C. Murphy, Chief Judge, is reprinted as Appendix A in support of this petition.

The Per Curiam Opinion of the Court of Special Appeals of Maryland, No. 1709, September Term 1993,

and dated June 7, 1994, which is unreported, but reprinted as Appendix B in support of this petition.

A companion case entitled *Jennifer Lynn Tower Westfall, et al. v. Ray Douglas Westfall* was appealed in which the judgment of the Circuit Court for Prince George's County, Maryland was reversed in part and remanded for further proceedings by Opinion of the Court of Special Appeals of Maryland, No. 140, September Term 1993 and dated November 19, 1993, which is unreported, but reprinted as Appendix C in support of this petition.

JURISDICTION

The Final Order of the Court of Appeals of Maryland was entered on October 19, 1994 (Appendix A). Jurisdiction of the United States Supreme Court is invoked pursuant to Title 28, United States Code §1254(1). The Petition for Writ of Certiorari was filed within ninety (90) days of the final order of the Court of Appeals of Maryland. Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, inter-alia, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MARYLAND'S DECLARATION OF RIGHTS

Certain provisions of Maryland's Declaration of Rights declare as follows:

(a) **Article 19. Remedy for injury to person or property.**

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without any denial, and speedily without delay, according to the Law of the land.

(b) **Article 24. Due process**

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land. (1977, ch. 681, ratified Nov. 7, 1978.)

(c) **Article 26. Warrants**

That all warrants without oath or affirmation, to search suspected places, or to seize any person or property, are grevious [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

STATUTES

Title 42, U.S.C.A. Section 1983 entitled Civil Action for Deprivation of Rights which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Section 1-202, Courts & Judicial Proceedings entitled Contempt of Court provides as follows:

> "(a) *Exercise of power.* — A Court may exercise the power to punish for contempt of court or to compel compliance with its commands in the manner prescribed by the Maryland Rules or Maryland District Rules."
>
> "(b) *Adjudication of contempt not bar to relief in same proceedings.* — A person who has been adjudicated guilty of contempt for failure to pay a monetary amount specified in a decree or order passed in a civil proceeding is not barred by reason of the adjudication of contempt from filing a petition for modification of the decree or order, requesting any other relief, or proceeding to hearing on a petition, even though the contempt may be consolidated in the discretion of the court and heard with a citation for contempt, if the petition is at issue and ready for disposition in accordance with the practice in

the court in which the matter is pending. (An. Code 1957, art. 26, Sec. 4, 5; 1973, 1st Sp. Sess., ch. 2, Sec. 1.)"

All provisions of Maryland Rules regarding Subtitle P entitled "Contempt" specify as follows:

Rule P1. Definition.

As used in this Subtitle:

a. *Direct Contempt.*

A "direct contempt" means a contempt committed in the presence of the court, or so near to the court as to interrupt its proceedings.

b. *Constructive Contempt.*

A "constructive contempt" means a contempt which was not committed in the presence of the court, or so near to the court as to interrupt its proceedings.

c. *Defendant.*

"Defendant" means a person against whom contempt proceedings have been instituted.

Rule P2. Application.

a. *To apply to Civil and Criminal Contempt.*

This Subtitle shall apply to both civil and criminal contempts.

b. *Contempt in the Court of Appeals or the Court of Special Appeals.*

This Subtitle shall be applicable to a proceeding for contempt of the Court of Appeals or the Court of Special Appeals, except that –

(1) the Attorney General or any other member of the bar may be appointed as prosecutor, and

(2) section d2 of Rule P4 (Constructive Contempt) shall not be applicable to such proceedings.

(Amended June 23, 1967, effective Sept. 1, 1967.)

c. *Labor Cases.*

Rules P1 to P5 do not modify or supersede Sections 72 and 73 of Article 100 of the Code.

Rule P3. Direct Contempt.

a. *Summary Punishment.*

A direct contempt may be punished summarily by the court against which the contempt was committed.

b. *Order of Contempt.*

Where direct contempt is committed, the court shall sign a written order to that effect. The Order shall recite the facts, be signed by the judge and entered of record. The order shall state which of the facts were known to the court of its own knowledge and as to any facts not so known, the basis for the court's finding with respect thereto.

c. *Record.*

The record in such cases shall consist of

(1) such order of contempt,

(2) any affidavit filed by the defendant,

(3) any affidavit filed by the State's attorney in support of the order of contempt, if the court directed him to investigate or prosecute the contempt, and

(4) any testimony offered.

Rule P4. Constructive Contempt.

a. ***Who May Institute.***

Constructive contempt proceedings may be instituted by the court of its own motion, by the State's attorney or by any person having actual knowledge of the alleged contempt.

b. ***Notice to Defendant.***

1. Show Cause Order.

(a) Issuance.

If the court determines to cite the defendant for contempt, it shall issue an order requiring the defendant to show cause why an order adjudging him in contempt shall not be passed within the time stated therein.

(b) Contents.

The show cause order shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged.

(c) Service.

The show cause order shall be served upon the defendant pursuant to Rule 2-121 unless the defendant has appeared as a party in the action in which the contempt is charged, in which case service shall be in the manner prescribed by the court.

2. Written Statement.

A copy of any writing or document filed in support of the alleged contempt shall also be served upon the defendant.

c. ***Default – Answer.***

If the defendant shall answer, the charge shall be set for hearing. If no cause be shown within the time named in the order, the case shall be heard *ex parte.*

d. ***Hearing.***

1. Appointment of Prosecutor.

The court may designate the State's attorney or any other member of the bar to prosecute the proceeding.

2. When Judge Disqualified.

Unless a defendant otherwise consents, the judge who issued a citation for constructive contempt shall be disqualified from presiding at the hearing except where such contempt consists of failure to obey an order or judgment in a civil case.

(Amended September 23, 1968, effective Oct. 1, 1968; Apr. 6, 1984, effective July 1, 1984.)

Rule P5. Bail.

Where a defendant has been committed for a contempt he shall have the same rights with respect to admission to bail pending appeal as an accused in a criminal proceeding.

STATEMENT OF THE CASE

In response to the petitioner's suit for tortious misconduct, Judge Missouri has asserted the defense of judicial immunity, a principle of law recognized in Maryland. In *Rice v. Dunn,* 81 Md. App. 510, 568 A.2d 1125 (1990), the Maryland Court of Special Appeals observed as follows:

> "The seminal case in the United States Supreme Court relating to judicial immunity in *Bradley v. Fisher,* 13 Wall., 335, 20 L.Ed. 646 (1872), holding that judges acting in the exercise of judicial acts within their jurisdiction are immune from suits for civil damages. The Supreme Court acknowledged that judicial immunity has been the settled doctrine in the English courts for many centuries and 'has never been denied, that we are aware of, in this country.'
>
> The common law of England, including the common law doctrine of judicial immunity, was adopted in Maryland by the Maryland Constitution of 1867. Maryland courts gave recognition to common law

judicial immunity in *Hiss v. State,* 24 Md. 556 (1866), holding that a justice of the peace could not be held civilly liable for a judicial act, as opposed to a ministerial act, performed by him."

Bradly v. Fisher, supra, refers to precedents from the Court of Kings Bench, regarding the distinction between acts done in "excess of jurisdiction" and acts where "no jurisdiction" exists whatever over the subject matter. A majority of this Court noted as follows:

"*Mr. Justice* Blanc said there was 'a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;' and held that where the subject matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should, by reason of error, be entitled to have the conclusion set aside and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion as if the court had proceeded without any jurisdiction. *Calder v. Halket,* 3 Moore P.C. 28."

"The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is jurisdiction of the subject matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action from

> whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

Therefore, Judge Missouri must refer to Maryland law to determine if his conduct, tortious or not, is based upon jurisdiction to perform the judicial acts of issuing a writ of body attachment the arrest and incarceration of the petitioner who contends that the Maryland Declaration of Rights guarantees his personal freedom by Article 24 entitled "due process", which provides that an arrest warrant ought not issue or be granted unless based upon oath or affirmation; and Article 19 which states that every man ought to have a remedy by the course of the law of the land for any injury done to him. To the same effect language can be found in the 14th Amendment to the Federal Constitution.

Judge Missouri had no authority under Maryland law to issue the Writ of Body Attachment because it fails to give the reason or offense allegedly committed to justify issuance of the Writ; that execution of the Writ shall be returnable only to Judge Missorui; and that the petitioner shall have no right to bond. (Appendix D)

The Maryland Court of Special Appeals held that Judge Missouri failed to observe the requirements of Maryland law, specifically the "P" rule shortcomings dealing with contempt as incorporated in Courts & Judicial Proceedings, Sec. 1-202, Md. Code, dealing with the

power to exercise for contempt. Thus, the $150.00 cash sanction imposed against the petitioner was reversed and vacated. *Westfall et al. v. Westfall* (Appendix C). Accordingly Judge Missouri did not avail himself of the powers outlined in C.J.P. Sec. 1-202 Md. Code by failing to "invoke" its requirements; therefore, he lacked the jurisdiction to issue the Writ of Body Attachment and to incarcerate the petitioner for appearance before him "only" at his pleasure. (Appendix D) These were not merely irregularities or legal errors in the exercise of judgment within the purview of a judicial act.

STATEMENT OF FACTS

This litigation was precipitated when Judge Missouri decided to set a special hearing solely to test the veracity of the petitioner's client in a domestic relations matter stating that if he found that she might give false testimony that the respondent would refer the matter to the State's Attorney for possible prosecution. Petitioner filed a motion to cancel the hearing or for the respondent to recuse himself since he had not previously seen or heard from the petitioner's client. When Judge Missouri denied both motions, the petitioner filed a Line to the Clerk of Court that neither he nor his client would appear for the specially set hearing. As a result, the petitioner was arrested, denied release on bail, incarcerated, and later found in contempt of court by Judge Missouri. These actions were deemed improper by the Maryland Court of Special Appeals in two appellate decisions incorporated into this petition as part of the Appendix. The Maryland Court of Appeals declined to review the petitioner's request for a review of the dismissal of his complaint for money damages against Judge Missouri.

The petitioner's complaint for tortious misconduct alleged, inter alia, as follows: that he has been continuously engaged in private law practice since August 1, 1952, having been admitted to the following: Virginia Supreme Court of Appeals March 8, 1951; U.S. Court of Appeals for District of Columbia March 25, 1952; United States Supreme Court October 4, 1954; and Maryland Court of Appeals November 5, 1958.

That Judge William D. Missouri is a duly certified Associate Judge of the Circuit Court for Prince George's County, Maryland; that the respondent issued a Writ of Body Attachment directing any peace officer to seize the body of the petitioner at his law office address only which was executed on December 29, 1992 at 11:15 a.m. Thereafter, petitioner was handcuffed, escorted through his office building and placed into a paddy wagon parked in the office building proper.

Then the petitioner was unlawfully incarcerated for approximately two to three hours in the Courthouse jail cell when he was required to remove his jacket and trousers and his stockings for a contraband inspection, then to surrender his wedding ring, wrist watch, Lions Club lapel pin, handkerchief, necktie, trouser belt, and shoe laces and later produced before Judge Missouri "forthwith" as directed by the Writ of Body Attachment. The petition alleges that Judge Missouri failed to observe Maryland Statutes and Rules regarding contempt proceedings and violated the petitioner's right to his personal freedom contrary to due process of law as ordained by the United States and Maryland Constitutions.

PRIOR PROCEEDINGS

The petitioner filed his complaint for money damages with a demand for a jury trial in the Circuit Court for Prince George's County, Maryland. Before any discovery was undertaken or any responsive pleadings filed, Judge Missouri moved for Dismissal or Summary Judgment of the Complaint upon the ground that the suit failed to state a claim upon which relief could be granted because the respondent is entitled to invoke judicial immunity. No affidavit or exhibit was ever filed by Judge Missouri in support of his judicial immunity claim. After argument by respective counsel without any testimony being offered, the Circuit Court for Prince George's County entered an order dismissing the complaint.

Petitioner appealed this final order of dismissal to the Court of Special Appeals of Maryland where the judgment was affirmed in an unreported per curiam opinion dated June 7, 1994, by Wilner, C.J., Garrity and Bell, Associate Judges, holding as follows:

> "Appellee may have acted improperly or in excess of his jurisdiction, but he clearly had jurisdiction to act. In that respect, liability does not attach to court's actions, however improper, because the court was not acting in the clear absence of jurisdiction. Appellee merely discharged imperfectly the authority granted him by statute. He is therefore entitled to full judicial immunity for his actions." (Appendix B, 9a).

Thereafter, a petition for writ of certiorari was filed with the Court of Appeals of Maryland and upon consideration of the answer filed thereto, an order was entered on October 19, 1994, denying the petition reflecting that no showing was made that a review by certiorari was desirable and in the public interest. 336 Md. 293, 648 A.2d 204.

REASONS FOR GRANTING THE WRIT

Unlike intermediate appellate courts, the Maryland Court of Appeals has never spoken upon the issue of civil liability of a Circuit Court Judge for violations of a person's rights under Maryland's Declaration of Rights even though judicial immunity extends to all classes of courts, including the highest judge of the nation to the lowest sitting in petty cases.

Firstly, the petitioner contends that this appeal should be remanded to the Maryland Court of Appeals as an issue of first impression.

The Maryland Court of Appeals has held that a private action for compensatory damages exists for violations of Articles 24 and 26 of the Maryland Declaration of Rights. *Widgeon v. Eastern Shore Hospital Center,* 300 Md. 520, 479 A.2d 921 (1984). The issue of judicial immunity was not applicable in that case which recognized that Articles 24 and 26 are equated with the 4th, 5th, and 14th amendments of the Federal Constitution.

The Maryland Court of Appeals also observed that a review of Maryland Case Law disclosed that a *public official* who violates the plaintiff's rights under the Maryland Constitution is entitled to NO immunity. *Clea v. City of Baltimore,* 312 Md. 662, 541 A.2d 1303 (1988). This case involved a suit against a police officer and his claim to immunity as a public official. The Maryland Court of Appeals noted as follows:

> "On the other hand, constitutional provisions like Articles 24 or 26 of the Maryland Declaration of Rights, or Article III, Sec. 40 of the Maryland Constitution, are specifically designed to protect citizens against certain type of unlawful acts by governmental officials. To accord immunity to the

> responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions."

Secondly, the petitioner contends that appeals involving judicial immunity should not be the subject of initial review by this Honorable Court but deferred to each individual state where the doctrine has been incorporated and made part of its Constitution.

An intermediate Appellate Court of Maryland has taught us that: "the common law of England including the common law doctrine of judicial immunity was adopted in Maryland by the Maryland Constitution of Maryland of 1897, Maryland courts gave judicial recognition to common law judicial immunity in *Hiss v. State,* 24 Md. 556 (1866), holding that a justice of the peace could not be held civilly liable for a judicial act, as opposed to a ministerial act, performed by him." In *Rice,* supra, the Court of Special Appeals of Maryland held that District Court Commissioners are judicial officers and absolutely immune from civil liability for judicial acts performed within their jurisdiction.

In *Davis v. Di Pino,* the Court of Appeals recently granted certiorari to review a decision of the Court of Special Appeals affirming the grant of summary judgment involving a suit against a police officer, city officials and District Commissioner alleging violations of appellant's rights under 42 U.S.C.A., Section 1983, dealing with qualified immunity. 99 Md.App. 282, 637 A.2d 475 (2/23/94).

Thirdly, this Court should reconsider the recent precedent of *Mireles v. Waco,* ___ U.S. ___ , 112 S.Ct. 286, 116 L.Ed.2d 9 (1991), which involved a court order authorizing use of excessive force against an attor-

ney who was absent from Judge Mireles' courtroom. The petition for certiorari was granted and summarily reversed without briefing or oral argument.

The *Mireles* case is distinguishable because Judge Missouri ordered an unlawful arrest resulting in a false imprisonment of the petitioner attorney in violation of his rights guaranteed by the Maryland Constitution. The Judge Mireles' order allegedly authorized excessive force to seize a lawyer in the courthouse building by bringing the attorney to his courtroom.

Finally, Judge Missouri never acquired jurisdiction over the petitioner in the cottempt action as provided by the Maryland Code of Laws. Section 1-202, Courts and Judicial Proceedings, incorporating Maryland P rules, specifically deprived Judge Missouri of jurisdiction by virtue of Rule P4(d)(2) which disqualified the judge from presiding at the hearing where he has issued the citation. See Statutes p. 8.

CONCLUSION

A judge acquires jurisdiction by virtue of a statutory provision to exercise judicial power with restraint. Even if the act of issuing a body attachment was "judicial", judicial immunity does not attach if Judge Missouri acted in clear absence of all jurisdiction and in violation of the petitioner's rights guaranteed by the Maryland Constitution and Declaration of Rights. No Judge has jurisdiction to incarcerate any person in complete disregard of established laws in violation of due process of law.

Therefore, this Court should grant certiorari to consider:

(a) Whether Judge Missouri is immune from a civil suit for money judgment; and

(b) Whether the summary reversal of *Mireles v. Waco* should be reconsidered in view of its impact on the administration of justice as it applies to the Doctrine of Judicial immunity; and

(c) Whether each individual state should fashion its own rule of law regarding the Doctrine of Judicial immunity in accordance with its constitution and common law adaptations; and

(d) That this petition be remanded to the Maryland Court of Appeals for its determination of the issues raised for the first time as part of Maryland's jurisprudence.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND
Petition Docket No. 291, Sept. Term 1994
(No. 1709, Sept. Term 1993, Court of Special Appeals)

EDWARD JOHN SKEENS

v.

WILLIAM D. MISSOURI

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: October 19, 1994

APPENDIX B

[UNREPORTED]

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 1709

September Term, 1993

EDWARD JOHN SKEENS

v.

WILLIAM D. MISSOURI

Wilner, C.J.
Garrity
Bell, Rosalyn B. (retired, specially assigned)
JJ.

PER CURIAM

Filed: June 7, 1994

This appeal arose out of matters that we first addressed in *Westfall v. Westfall,* No. 140, Sept. Term 1993 (unreported) (filed November 19, 1993). To understand this appeal, we must review what happened in that other case.

Appellant, an attorney in Prince George's County, represented Jennifer Westfall in her divorce and related matters in 1992. During the course of those proceedings, appellant sought to have appellee, who was presiding over the case, recused, alleging that, as a result of certain comments made by the court during a December 17, 1992

hearing on Ms. Westfall's exceptions to the master's report, appellee had exhibited "bias and prejudice" against Ms. Westfall and had improperly "prejudged" her case. Filed along with that motion was a motion to have the evidentiary hearing on the merits of the exceptions, which was scheduled for December 29, 1992, cancelled. Both motions were denied.

The case was called on the morning of December 29. At that time, the court stated on the record:

> "Let the record reflect that [appellant] just showed up in my chambers a couple of minutes ago and dropped off a line that said: 'By order dated December 18, 1992, [appellee] has refused to recuse himself from participation in this cause. The defendant, Jennifer Lynn Tower Westfall, believes that she is at risk for being charged with criminal prosecution for perjury should [the trial judge] find her testimony to be false or erroneous. Therefore, neither the defendant, Jennifer Lynn Tower Westfall, nor her attorney [appellant], will appear at hearing set for December 29, 1992, at 9:30 a.m. in order to protect their position that the hearing should have been canceled and that [the trial judge] should have recused himself from participation in the cause.
>
> Now, [appellant] as an officer of this court was told to be in court on the day that I set this matter. His client may not have been there, I don't know, but he was told unequivocally to be here. He was told that this matter would not be continued. When he dropped this off, I told him to be in court.
>
> He is not here. A writ of attachment is hereby issued forthwith, no bond, returnable to me only. The sheriff is hereby commanded to taken into their custody [appellant] and bring him forthwith before this court."

Appellant was forcibly brought before the court later that day and asserted that he had not appeared because he was tending to a probate case elsewhere in the courthouse during the time that the hearing before appellee was scheduled and that the court had not in fact ordered him to appear. After addressing substantive matters in the divorce proceedings, the court fined appellant $150 to be paid to Mr. Westfall's attorney for the time spent in court that morning.

As part of the appeal of the substantive matter, we reviewed the imposition of the sanction. We found that the court's actions failed to meet the requirements of the P Rules for issuance of a civil contempt, whether viewed as a direct or constructive contempt. We also held that the imposition of the fine could not have been upheld as a sanction pursuant to Md. Rule 1-341, as no findings were made on the record. Accordingly, we reversed and vacated the part of the judgment that assessed the $150 sanction against appellant. In closing, we noted that "[t]here were undoubtedly ways that the judge could have sanctioned [appellant] for his conduct. We merely hold that, as shown by this record, the trial judge failed to observe the requiremens to do so." *Westfall, supra,* slip op. at 23.

Subsequently, appellant filed the instant complaint for money judgment, alleging "Malicious Abuse of Process" and "False Arrest and False Imprisonment." In the complaint, appellant described the circumstances under which the sheriff served the writ of attachment and brought him to court, which included the use of handcuffs and his being carried away in a "paddy wagon," and asserted that those events were the "culmination of an unlawful order issued by the defendant, not in his capacity as a judicial officer, but as an individual venting

his spleen because of [appellee's] anger and conscious effort to teach [appellant] a lesson." The "abuse of process" charged was the issuance of an "arrest citation" without charging appellant with contemptuous conduct or holding a hearing and adjudicating him to have acted with direct or constructive contempt; the court's actions were alleged not to have been in compliance with Md. Rule P4(b) and P4(d)(2). The second count described the circumstances of appellant's confinement, including the removal and inspection of his clothes for contraband and the temporary removal of his valuables, belt, and shoe laces, among other items, and asserted that appellee's acts constituted a "violation of [appellant's] right to personal freedom contrary to due process of law as provided [by] the Constitution of Maryland and the Constitution of the United States."

In response to the complaint, the Attorney General, on behalf of appellee, filed a motion to dismiss for failure to state a claim upon which relief could be granted or for summary judgment, asserting that appellee was entitled to absolute judicial immunity. After a hearing in the Circuit Court for Prince George's County before a judge of the Circuit Court for Montgomery County specially assigned by the Chief Judge of the Court of Appeals pursuant to Md. Rule 1200(a), the court granted the motion to dismiss, holding:

> "It is well established in American law that a Judge is generally immune from a suit for money damages. This [principle] of judicial immunity can be traced back to, of course, the Bradley case. *Bradley vs. Fisher* [80 U.S. (13 Wall) 335 (1872)] in which the Supreme Court held immunity is vital for the proper administration of justice. The Supreme Court stated that without judicial immunity, a Judge may be made to fare the repercussions of his

decision and, of course, that was accurate in the *Morales* case [*Mireles v. Waco*, 112 S.Ct. 286 (1991)] that was being referred to here this afternoon.

The cases following *Bradley* have held that judicial immunity may be overcome in only two sets of circumstances. First, a Judge is not immune from liability for actions not taken in the Judge's judicial capacity and; second, a Judge is not immune for his actions. although judicial in nature in complete absence of all jurisdiction.

Now the first exception, of course, does not apply in this matter. Here [appellee] was in the courtroom and acting within his judicial role. I don't think that [appellant] takes any serious contention that the action that he took was not in his judicial capacity. The second exception to judicial immunity for actions taken in complete absence of all jurisdiction requires a more detailed analysis. In *Bradley* the Court stated Judges of courts have superior or general jurisdiction, are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly.

The Court there went on to explain that there is a distinction between an excess of jurisdiction and a clear absence of jurisdiction. *Bradley* Court illustrated the distinction by explaining the Judge. The Probate Court with jurisdiction limited to wills attempted to try a person for a criminal offense. He would, of course, not be immune because there would be a complete absence of jurisdiction. However, the Judge with jurisdiction over criminal offenses would be immune even if he tried and convicted a person for conduct that was not by law a criminal offense. This would be in excess of jurisdiction and judicial immunity would be allowed.

> The distinction, of course, is between absence of jurisdiction and excess of jurisdiction, and the case in Bar, the issue centers on whether [appellee] acted in absence of all jurisdiction under the [Courts & Judicial Proceedings] Article Section 1-401 Circuit Court of full common law and equity powers and jurisdiction in all civil and criminal cases within [its] County and all of the additional powers and jurisdictions conferred by the [Constitution] and by law except [where by] law jurisdiction has been limited or conferred exclusively upon another tribunal.
>
> Now it is, I think, without any debate clear that a Circuit Court Judge has jurisdiction[ ] to make findings of contempt, and that's set forth in the [Courts & Judicial Proceedings] Article 1-202. Thus, [appellee] in the case at Bar did not act in the absence of jurisdiction in making a finding of contempt and judicial immunity applies. [Appellant's] contention that the proper rules were not followed in issuing the contempt order, even if found to be true, can only result in the finding that [appellee] acted in excess of his jurisdiction. In either case the doctrine of judicial immunity clearly applies to the facts of this case. Therefore, the Court finds because the doctrine of judicial immunity applies, [appellant] fails to state a claim upon which relief may be granted and, therefore, [appellee's] motion to dismiss is granted. Summary judgment motion is, therefore, of course, moot."

Appellant timely filed this appeal and raises three questions for our review:

> "1. Did Judge Missouri deprive attorney Skeens of his right to personal freedom without due process of law in violation of the Maryland and United States Constitutions when he issued a body attachment against attorney Skeens which provided a

denial of release on bond and returnable to Judge Missouri only?

2. Was Judge Missouri acting in excess of jurisdiction or totally without jurisdiction to proceed further when he issued a writ of body attachment against attorney Skeens?

3. Does the doctrine on judicial immunity apply where a complaint properly states a cause of action for malicious abuse of process, false arrest and false imprisonment?"

We hold that the circuit court correctly held that judicial immunity barred this action, and we shall therefore affirm.

Discussion

The trial court correctly restated the doctrine of judicial immunity as expressed by the U.S. Supreme Court: "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 351 (1872). Liability only attaches when the court acts in "the clear absence of all jurisdiction over the subject matter," not merely where the wrongful conduct is in "excess" of the court's jurisdiction. *Id.*; *see also Mireles v. Waco,* 112 S.Ct. 286 (1991).

We have previously noted that the Court of Appeals has adopted that same distinction. *See Parker v. State,* 92 Md. App. 540, *cert. granted,* 328 Md. 462 (1992), and cases cited at 547. There, we observed that:

"the Court has held that 'jurisdiction' in this fundamental sense refers to 'the power to render a judg-

> ment over that class of cases within which a particular one falls' and not to the propriety of granting the relief sought. *See, for example, Pulley [v. State], supra,* 287 Md. [406] at 416, 412 A.2d 1244 [(1980)] (emphasis added)."

Id. at 547.

Appellant's actions, in informing the court of his intent not to appear at a previously scheduled hearing despite the court's specific request or instruction that he should appear, were in the nature of a contempt, possibly direct, possibly constructive. *See* Md. Rule P1 (definitions). In either case, there are certain procedures that the court must follow, and this Court has already found that the circuit court did not follow them. *See Westfall, supra,* slip op. at 22-23. It is clear, however, that the circuit court has authority to punish contempt; the court has the power to render judgment over such cases. *See* Md. Code Cts. & Jud. Proc. art., §1-202. It also has the power to issue body attachments. Appellee may have acted improperly or in excess of his jurisdiction, but he clearly had jurisdiction to act. In that respect, liability does not attach to the court's actions, however improper, because the court was not acting in the clear absence of jurisdiction. Appellee merely discharged imperfectly the authority granted him by statute. He is therefore entitled to full judicial immunity for his actions.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

APPENDIX C

[UNREPORTED]

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

No. 140

September Term, 1993

JENNIFER LYNN TOWER WESTFALL, et al.

v.

RAY DOUGLAS WESTFALL

Bloom,
Cathell,
Harrell,

JJ.

PER CURIAM

Filed: November 19, 1993

Jennifer Lynn Tower Westfall, defendant and counter-claimant below, and her attorney, Edward John Skeens, Esquire, appellants in this case, seek our review of an Amended Judgment of Absolute Divorce, dated 5 January 1993 and entered 12 January 1993, granted by the Circuit Court for Prince George's County to Ms. Westfall's former husband, Ray Douglas Westfall, which, collaterally, awarded counsel fees to Mr. Westfall's counsel,

William F. Renahan, Esquire. What the Westfalls' interests are with regard to this matter is evident from the essential nature of the proceedings, i.e. dissolution of their marriage and a paternity/child support matter. The attorneys' roles in this appeal, other than as advocates for their respective clients, are premised on the fact that the circuit court's judgment also directed that Mr. Skeens pay $150 to Mr. Renahan as a sanction for the former's failure to appear at an evidentiary hearing to have been held concerning Ms. Westfall's exceptions to the report and recommendation of the master.

Appellants pose the following questions, which we have slightly rephrased:

> I. Should the trial judge have overruled the wife's exceptions to the recommendations of the master for domestic relations causes and awarded the husband an absolute divorce?
>
> II. Should the trial judge have canceled the evidentiary hearing set for December 29, 1992, and recused himself from further participation in this proceeding?
>
> III. Did the trial judge have the authority to order a body attachment for attorney Edward John Skeens and, as a sanction for contemptuous conduct, to require Skeens's payment of attorney fees in the sum of One Hundred Fifty Dollars?
>
> IV. Did the appellant Westfall abandon her cause of action by refusing to appear at her own exceptions hearing, thereby permitting the trial judge to order a dismissal of her counterclaim seeking child support for their minor child, for invalidation of a separation agreement, and for an award of counsel fees?

FACTS

Ray Douglas Westfall (Ray), through counsel, filed a complaint for absolute divorce in the circuit court on 20 May 1992. In addition to alleging as grounds for the divorce the parties' voluntary separation of a duration exceeding twelve continuous months, Ray's complaint stated that there were no children born of the marriage. He sought five items of relief: (1) a divorce; (2) incorporation, but not merger, of the terms and conditions of the parties' written separation and property settlement agreement (the agreement) in the final decree; (3) he be taxed the court costs and each party bear their respective attorney's fees in the proceedings; (4) a general prayer for "such other and further relief as the nature of this cause may require;" and, (5) appellant, Jennifer Lynn Tower Westfall (Jennifer), be restored her maiden name of Jennifer Lynn Tower.

Jennifer ultimately submitted to the circuit court on 15 July 1992 a *pro se* answer to the complaint, which was accepted by the circuit court on 20 July and duly filed that same day. In her answer, Jennifer admitted each allegation of Ray's complaint and concurred with the relief he sought, adding only that she wanted Ray to be responsible for "her respective costs," presumably referring to her attorney's fees, if any. We presume she was referring to her legal expenses as she had separately agreed that he should pay "costs of the proceedings as taxed by the Clerk." In addition to excellent calligraphy, Jennifer's handwritten *pro se* answer demonstrated a hint of lawyerly input. Its content and format could have served as a model pleading for recently admitted attorneys. In addition to setting forth individual responses to each of the numbered paragraphs of Ray's complaint,

the answer opened with a formal salutation to the court and closed with a near-perfect certificate of service upon Ray's then attorney. Jennifer listed as her address 12 MelMara Drive, Oxon Hill, Maryland 20745-1017.

In a memorandum dated 23 July 1992 and filed in the case on 3 August, the circuit court noted, among other things, that the case had "been referred to the Assignment Office to schedule a hearing." By copies to Ray's then attorney and to Jennifer at the address she had provided to the court in her answer, the memorandum also advised Jennifer that, in order to regain her maiden name specifically, she would need to attend the hearing personally or submit a completed form affidavit, a copy of which was attached to her copy of the memorandum. There was no indication in the record that Jennifer's copy of the memorandum and affidavit were returned as undelivered by the U.S. Post Office.

It was at this juncture in the relatively smooth sailing of an apparently uncontested divorce proceeding that the waters began to develop a chop. Jennifer apparently changed her mind about many aspects of the proceedings. She engaged Edward John Skeens, Esquire, as counsel. He filed with the Clerk's Office of the circuit on 29 July 1992, on Jennifer's behalf, an amended answer and counterclaim that injected for the first time in the proceeding the following contested matters: (1) the agreement was invalid for a number of reasons; (2) Ray had fathered a child, Kyrie Inez Westfall, with her during the marriage; and, (3) she disclaimed a desire to resume the use of her maiden name. She continued, however, to admit the allegations of Ray's complaint as to the voluntary separation. Consequently, Jennifer sought: (1)

grant of the divorce as apparently prayed by Ray[1]; (2) Ray be held responsible for her and the child's counsel fees; (3) custody of the minor child; (4) child support; (5) DNA testing if Ray denied paternity; (6) a declaration that the agreement was null, void, and unenforceable; and, (7) "for such other and further relief as may be proper." A copy of this pleading was certified as mailed to Ray's then attorney on 28 July 1992. Skeens did not separately enter his appearance in the case or otherwise inform any court personnel of his entry in the matter at that time.

The Domestic Assignment Division of the circuit court, unaware of the filing with the Clerk's Office of Jennifer's amended answer and counterclaim, prepared a notice of hearing in the case, dated 31 July 1992 and filed on 3 August, that notified the parties that the "uncontested divorce" was scheduled for a ten minute hearing before a master at 10:10 a.m. on 14 September 1992. Copies were sent to Ray's then attorney and to Jennifer at her previously provided mailing address. The record does not disclose that Jennifer's copy of this notice was returned as undelivered by the U.S. Post Office.

On 20 August 1992, Ray's present counsel, William F. Renahan, Esquire, filed with the circuit court his entry of appearance in the matter, concurrent with an answer to Jennifer's counterclaim.[2] Copies of both were mailed

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[1]At least, that is how we interpret the "WHEREFORE" clause of the answer she filed to Ray's complaint. To be sure, the prayers for relief of her counterclaim indicated that she also was asking that a divorce be awarded to her on the ground of voluntary separation.

[2]Ray's answer, among other things, denied the allegations of Paragraph "19" of the counterclaim. There was no such numbered paragraph in the counterclaim. We assume Ray intended

[footnote continued]

to Skeens on 14 August. It is a bit confusing from Ray's answer whether he denied paternity of Kyrie Inez. While he denied Jennifer's factual allegations as to their engagement in "procreative efforts" during the cohabitation phase of their marriage (Paragraphs 7 and 8), he admitted an allegation that, in part, stated he was "the natural father of this child."

At the same time he mailed the answer to Skeens, Renahan also mailed him interrogatories and a request for production of documents. Thereafter, on 21 August, Renahan mailed to Skeens a notice to take Jennifer's deposition at Renahan's office on 2 September, a copy of which was filed with the circuit court on 24 August. Five days later on 26 August, Renahan mailed an amended notice to Skeens rescheduling Jennifer's deposition to 22 September. A copy of this was filed with the court on 28 August. This placed her deposition eight days after the scheduled master's hearing. Although there is no competent testimonial evidence in the record to this effect, it would appear from pleadings and papers filed subsequently that Renahan rescheduled the deposition at Skeens' request. Although he knew the master's hearing was scheduled for 14 September, neither Renahan nor his paralegal revealed or discussed that date with Skeens at any of the times they communicated regarding rescheduling the deposition. Equally apparent from the record, though also lacking a formal evidentiary basis, is that Skeens had not been informed by Jennifer of the 14 September hearing date for which she had received notice. Another opportunity was missed because Skeens

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to deny Paragraph 18, which he did not otherwise mention in his answer, because it was the last numbered paragraph in Jennifer's counterclaim.

failed to review the court file after 3 August. Had he done so, he would have learned of the hearing date.

Ray and Renahan's associate, Paul B. Eason, Esquire, appeared on 14 September before the master, together with Ray's stepfather who testified as a corroborating witness as to the voluntary separation. Jennifer and Skeens did not appear. The master received Ray's and his stepfather's testimony *ex parte* and asked no questions of either witness. After receiving testimony establishing the voluntary separation and identifying the agreement and its execution as the parties' act, the master indicated he would recommend granting Ray a divorce that incorporated, but not merged, the terms of the agreement in a decree, and dismissing Jennifer's counterclaim. The only record reference to the failure of Jennifer and Skeens to appear occurred at the end of the hearing when the master confirmed Eason's understanding that "they [Jennifer and Skeens] can file exceptions even though they weren't here."

A copy of the master's written proposed recommendations was mailed to Skeens on 14 September. Skeens responded with written exceptions filed on 18 September. After confirming the attorney's ignorance (though not Jennifer's) of the scheduling of the 14 September date, the exceptions pleaded that Jennifer would be deprived of the opportunity to litigate the issues of paternity, child support, and validity of the agreement unless the master's proceedings and recommendations were nullified or the exceptions sustained. As further evidence of the credibility of his lack of knowledge of the hearing date, Skeens pointed-out that the very

day of the hearing he mailed to Renahan Jennifer's answers to the previously served interrogatories.[3]

A hearing on Jennifer's exceptions was held before the trial judge on 17 December 1992. No witnesses or documentary evidence were offered; only oral argument of counsel was received. Skeens, though admitting that it didn't "matter whose claim is granted as far as the divorce is concerned," successfully persuaded the trial judge to sustain the exceptions, primarily because of the diverse culpability for the confusion over the scheduling of the "uncontested" divorce hearing on 14 September. It is apparent from a reading of the transcript of the 17 December hearing that the trial judge felt Jennifer was entitled to an opportunity for a hearing on the paternity, child support, and validity of the agreement issues. In fact, rather than sent it back to the master, the trial judge decided to conduct the evidentiary hearing himself. He advised Skeens and Renahan that he would hear the evidence on 29 December 1992 at 9:30 a.m. In the course of discussing the paternity and agreement[4] claims to be

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[3]We note that, in response to Interrogatory numbers 12 and 17, Jennifer acknowledged that "there is no issue as to the voluntary separation."

[4]As to the child, the agreement provided only that

> As further clarification and not by way of restriction or modification of any other part of this Agreement, with regard to the child born subsequent to the separation, the parties specifically acknowledge that paternity is disputed, that no tests have been conducted, that neither party requests such tests to be conducted now or at any time in the future, and that neither party individually or both collectively maintains that Husband did, does, or will have any rights or responsibilities as to said child. Husband, in furtherance thereof, acknowledges that he did not, does not, and will not have any rights of custody, visita-

[footnote continued]

addressed at the future hearing and counsel's availability for that hearing date, the following exchanges occurred:

> MR. SKEENS: Your Honor, could you order the DNA on the three people?
>
> THE COURT: I don't know whether that will be necessary, because if I find that in fact she [Jennifer] knowingly, intelligently, voluntarily stated what she did, then I'm not going to order that unless counsel for the defendant [Ray, as to the counterclaim] in this cases decides that he wishes to find out about that. Because if she made that statement, she cannot later come back and say that I did not make the statement. My point is I want to know exactly what the contract stated in this case, and there is no rush. I can order DNA any time.
>
> MR. SKEENS: Well, we have a second issue on that. Even if she did do it knowingly, she cannot legally sign away her rights, the child's rights to support.
>
> THE COURT: Well, it is the child that must be protected.
>
> MR. SKEENS: And therefore the matter of custody and support would still be in effect, whether the agreement stands or falls. I don't have the case with me, but where a woman took a lump sum settlement for future child support and later on the

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> tion, adoption notice and/or intervention, or other role as to said child including such matters as supervision, education, religious training, area of residence in and/or out of the United States, as an heir at law, or in any other respect.

Jennifer contended the agreement was void because she entered into the agreement without benefit of counsel, thus rendering it not her voluntary and intelligent act. Ray countered that she discharged two attorneys during the time leading up to execution of the agreement and had, therefore, elected to negotiate and agree to its terms on her own.

husband says I don't have to pay, I paid a lump sum, the Court says no, you can't do that, the child has a right to receive support.

THE COURT: Mr. Skeens, I know what the law is as far as child support. I handle several cases a week so I understand that.

My point is I would like to know whether that agreement is any good, because if the lady is going to take the stand and say No, I didn't understand, if I find out that she did understand, then I'm going to find that she is a liar and that will affect a lot of things in the case.

It will not affect the child's rights, but it certainly can affect a lot of other things. So I suggest counsel see my secretary and then go to the Assignment Office.

MR. RENAHAN: Let's set it in the 29th. If I can't do it, I'll try to ask Mr. Eason to handle the matter.

MR. SKEENS: Can we do it at 1:00 o'clock? I have a 9:30 hearing in the probate court downstairs that morning.

THE COURT: I override probate court. You be here at 9:30 and we'll get you to probate court.

MR. RENAHAN: And I will have either Mr. Eason or myself doing this.

Can we divide this and give him a divorce today on all issues?

THE COURT: No, I don't want to do that today. I can assure you I will do the divorce on the 29th, but I want to find out whether that agreement should be incorporated but not merged into the divorce decree, and that's why I want to hold it, understanding the fact that you can't do away with the child's rights, but there are other provisions

> that I want to find out whether to be incorporated but not merged.
>
> Thank you. See you on the 29th.
>
> And Mr. Skeens, on your way out today, please stop up and tell the Register of Wills that I have ordered you to be here at that time and that I would appreciate if they would work out something for you with respect to that, because I'm going to try to do this hearing expeditiously to free you up for that.

On the following day, 18 December, Skeens filed a flurry of pleadings. He sought an order for DNA testing of Ray, Jennifer, and Kyrie Inez. He sought to have the 29 December hearing cancelled as "improvidently ordered," citing a number of alleged reasons that made little sense to us and apparently less to the trial judge. Lastly, counsel sought to have the trial judge recuse himself. In support of this request, Skeens stated that, among other things, the judge

> "stated on the record that he wanted to hear the testimony of the defendant [Jennifer]; and that if he found that she lied during the course of testimony that he would have her charged with perjury;"
>
> "has never seen or heard from the defendant previously in this case; and there is no base for [the trial judge] to prejudge the defendant's credibility as a witness;"
>
> "seemed perturbed at the defendant because he thought she was seeking alimony in this case;" and
>
> "has prejudged" [her answers to the interrogatories] "by concluding that the defendant has waived her right to seek custody in this case."

Skeens concluded, therefore, that the judge "has exhibited bias and prejudice against the defendant and has prejudged her case and her credentials, it is respectfully requested that his Honor recuse himself from further participation in this case."

The motions for recusal and cancellation of the 29 December hearing were denied by the trial judge by order dated 18 December 1992. This order, not docketed until 12 January 1993, expressed the trial judge's conviction that he was not biased against Jennifer, a person he had never met, and had he been so biased, he would not have set the case for an evidentiary hearing for 29 December so that she would have an opportunity to present her evidence.

The case was called in open court the morning of 29 December 1992, at which time the trial judge stated on the record:

> THE COURT: Let the record reflect Mr. Skeens just showed up in my chamber a couple of minutes ago and dropped off a line that said: "By order dated December 18, 1992, Judge Missouri has refused to recuse himself from participation in this cause. The defendant, Jennifer Lynn Tower Westfall, believes that she is at risk for being charged with criminal prosecution for perjury should [the trial judge] find her testimony to be false or erroneous. Therefore, neither the defendant, Jennifer Lynn Tower Westfall, nor her attorney, Edward John Skeens, will appear at hearing set for December 29, 1992, at 9:30 a.m. in order to protect their position that the hearing should have been canceled and that [the trial judge] should have recused himself from participation in the cause."
>
> Now, Mr. Skeens as an officer of this court was told to be in court on the day that I set this matter.

> His client may not have been here, I don't know, but he was told unequivocally to be here. He was told that this matter would not be continued. When he dropped this off, I told him to be in court.
>
> Here is not here. A writ of attachment is hereby issued forthwith, no bond, returnable to me only. The sheriff is hereby commanded to take into their custody Edward John Skeens and bring him forthwith before this court.

The judge indicated to Ray's attorney, Eason, who was again appearing in lieu of Renahan, that he would grant Ray a divorce, but that the order to be prepared must provide for blood tests due to the State's interest in the paternity of the child. He further indicated that if Ray is subsequently determined to be the father, the child "is entitled to support from the father." Eason then asked for monetary sanctions of $225, representing one and one-half hours of his time at $150 per hour, "as part of the purge of his [Skeens] contempt." To this request, the judge responded "[t]hat may very well be appropriate." The dialogue then addressed the fact that the judge could not sign an order incorporating, but not merging, the terms of the parties' agreement into the decree because the agreement had not formally been received into evidence before the master on 14 September. The matter was recessed, pending the Sheriff bringing Mr. Skeens before the court.

The hearing resumed at 12:10 p.m. when Skeens was brought before the court. Supplementing the line referred to by the judge at the beginning of the day, Skeens contended he had not appeared because he was tending to his probate case elsewhere in the courthouse, which took from 9:40 a.m. until approximately 10:40 a.m., and that he had not been ordered to appear in Jennifer's

case by the trial judge. The latter assertion stemmed from a conversation between the judge and Skeens occurring that morning in chambers and later repeated on the record, wherein the judge "strongly advised" Skeens to be in court at 9:30 a.m., the contents of the line notwithstanding.

After receiving testimony from Ray in order to avoid any staleness problem, the judge indicated he would sign a decree granting Ray an absolute divorce, directing blood tests and acknowledging the potential of child support if Ray is found to be the father, and dismissing Jennifer's counterclaim based on her abandonment of it. The judge also indicated that the agreement would not be incorporated in the decree because it had never been received in evidence. Skeens was assessed a "sanction" by the judge of $150 to be paid to Eason "for the time that he has taken this morning coming down [to court]."

An amended judgment of absolute divorce, consistent with the judge's oral disposition, was signed on 5 January 1993 and filed on 12 January. A timely appeal followed.

DISCUSSION

I.

Appellant's argument with regard to whether the divorce was properly granted to Ray stems not from any disagreement that the parties had lived separate and apart, without any cohabitation, for at least the statutory period. Rather, Jennifer quarrels with the validity of both the evidentiary hearing before the master on 14 September 1992 and the evidentiary hearing before the trial judge on 29 December 1992. Overlooking Jennifer's personal notice of the scheduling of the master's hearing and an attorney's obligation to be familiar with the mat-

ters reflected in the court file of a client's case, Skeens argues that he lacked actual notice of the 14 September hearing and the hearing should not have been held as an "uncontested divorce" hearing where an amended answer and counterclaim appeared in the record. As a consequence, he asserts that the 14 September hearing should be treated as a nullity in view of the abridgment of Jennifer's due process rights. Jennifer and her counsel are both wrong.

The trial judge did not overrule Jennifer's exceptions to the master's recommendations. To the contrary, at the 17 December exceptions hearing, the judge sustained virtually all of her specific exceptions, for better or worse, and elected to conduct a further evidentiary hearing himself on 29 December, rather than sent it back to the master. As we noted *supra,* regarding our review of the transcript of the 17 December hearing, Skeens did not challenge the accuracy or truthfulness of the evidence adduced before the master as to the voluntary separation ground for the divorce. What he objected to were the facts that the paternity and child support issues were not addressed and his client had not had an opportunity to present her evidence regarding the validity of the agreement that the master had recommended be incorporated in the decree. The trial judge observed that the agreement had not been formally received in evidence at the master's hearing and could not, therefore, properly have provided any basis for the master to recommend its incorporation.[5] The grounds of the divorce were never challenged by Jennifer in either her *pro se* or amended answers or her answers to Ray's interrogatories. It was

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[5] Ray did not seek to introduce the agreement in evidence when he testified at the 29 December hearing.

not unreasonable, therefore, for the trial judge to have considered the evidence adduced at the 14 September hearing on the "uncontested divorce," as to the grounds for divorce. It is apparent from our review of the record, and particularly the transcript of the 17 December hearing, that the circuit court sustained Jennifer's exceptions insofar as she asserted a right to be heard as to the validity of the agreement, paternity, child support, and, presumably, counsel fees. Her opportunity to be heard was scheduled to take place at 9:30 a.m. on 29 December.

The judge is presumed to know the law. Therefore, we presume that he knew that the only complete and competent evidence of the voluntary separation ground of the divorce sought was that adduced before the master through the testimony of Ray and the corroborating witness, his stepfather.[6] Because the agreement was never received in evidence, it could not have served to substantiate the grounds of divorce and, therefore, had no effect for that purpose. Md. Fam. Law Code Ann. §8-104 (1984, 1991 Repl. Vol.). Ray's testimony at the 29 December hearing solved any staleness problem. Rule S75(c); *Noffsinger v. Noffsinger,* 95 Md. App. 265 (1993). Given Jennifer's admission of the ground of the divorce and her knowledge of the scheduling of the 14 September hearing as to, at least, the "uncontested divorce" aspect of the proceedings, it was not improper for the trial judge to have granted Ray the divorce on this record.

II.

Recusal is a discretionary matter, and the judge's decision denying recusal should not be overturned

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[6] Ray's stepfather did not testify at the 29 December hearing.

unless *clearly* wrong. *Goldberger v. Goldberger,* 96 Md. App. 313, 317-18 (1993); *Surratt v. Prince George's County,* 320 Md. 439 (1990); *In Re Turney,* 311 Md. 246 (1987). There is no question that it was up to the trial judge to decide the recusal motion. No allegations of bias from extrajudicial sources were lodged. Similarly, no allegations of personal misconduct were tendered.

As the Court of Appeals has recently noted, judges are required to be impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified. *Barry Jefferson-El v. State,* 330 Md. 99 (1993), citing *Boyd v. State,* 321 Md. 69 (1993); *Doering v. Fader,* 316 Md. 351 (1989). As *Jefferson-El* further teaches, recusal may be required not only when the trial judge has an actual personal bias against a party, but also when the trial judge creates a situation in which it would appear that he could not, with impartiality, preside at the subsequent proceedings. *Id.* at 105. In the latter instance, it is the appearance of impropriety that requires the judge to be recused. The bias must have derived from a "personal," rather than a judicial source. *Boyd,* 321 Md. at 76. Where knowledge is acquired in a judicial setting, or an opinion expressing bias is formed on the basis of information acquired from evidence presented in the course of a judicial proceeding before that judge, neither that knowledge nor that opinion qualifies as "personal." *Boyd,* 321 Md. at 77; *Doering,* 316 Md. at 356.

In assessing the trial judge's conduct in the case *sub judice,* we shall confine our review to Jennifer's allegations as presented in her motion to recuse filed on 18 December 1992. We do this because it was the only time

such a motion was made. This motion was premised on the trial judge's conduct at the 17 December hearing. All of Jennifer's accusations of the judge's bias toward her stem from three exchanges. We shall review each, through addressing two of the colloquies into one discussion as they occurred before the judge announced his ruling, while the remaining remarks followed.

Prior to announcing his disposition of Jennifer's exceptions, the judge engaged in a brief exchange with Skeens regarding the paternity question. The discussion revolved around the evidentiary presumption concerning paternity of a child born during a marriage. The judge, while acknowledging the accuracy of Skeens' statement regarding the presumption of legitimacy, observed that, if "this goes back [referring to the master or for any renewed evidentiary hearing]," Skeens and Jennifer may want to consider that she will have to answer certain interrogatories she had previously declined to answer, upon advice of counsel, inquiring into any, or a specific alleged, extramarital sexual relationship that could bear on access by another male during the period the child might have been conceived. The judge indicated that he was merely cautioning Jennifer and anticipating what Ray's counsel would insist on in such an event. Skeens, at that time, responded "I have no problem answering that [the interrogatories] if the Court feels it is an important part of the case [as to paternity]." The judge concluded that it may become an issue, particularly in light of other statutes.[7]

Jennifer sought to recast the judge's comments in a new light in her motion seeking recusal. She appeared

[7]We presume the judge was referring to issues pertaining to §§1-205 through 1-208 of the Md. Estates and Trusts Code Ann. (1991 Repl. Vol., 1993 Cum. Suppl.).

to argue that the judge was assisting Ray's counsel by suggesting possible tactics for him to employ in the event of further evidentiary hearings regarding paternity. She also suggested that any adultery committed on her part prior to the child's birth, even if it fell at a time when it could arguably have resulted in the child's conception, would be irrelevant if the DNA tests pointed to Ray as the father.

We do not perceive how these assertions, standing alone or in the larger picture of what later transpired at the 17 December hearing, supports the conclusion that the trial judge exhibited bias towards Jennifer. No proceedings to determine paternity have transpired. No blood test results are reflected in the record before us. The judge's cautionary advice was obviously intended to cause Jennifer to be reflective of the full array of potential consequences of the relief she was seeking.

There was a subsequent exchange in which the judge admitted that he erroneously assumed Jennifer was seeking alimony in her counterclaim. She was not, as Skeens pointed out to the judge. The judge acknowledged his error, saying "[M]aybe I misread it. I read a lot of stuff last night." This self-correcting admission has no bearing on whether the judge was biased against Jennifer.

b.

Skeens renewed his request for DNA testing to be conducted before the 29 December hearing. At that point, the judge expressed a hesitancy to order it. He preferred initially to inquire into the status of the agreement. Skeens replied that, regardless of the resolution of the validity *vel non* of the agreement, "the child's rights to support . . . must be protected." In acknowl-

edging his concert with that proposition, the judge nonetheless said:

> My point is I would like to know whether that agreement is any good, because if the lady is going to take the stand and say no, I didn't understand, if I find out that she did understand, then I'm going to find that she is a liar and that will affect a lot of things in the case.
>
> It will not affect the child's rights, but it certainly can affect a lot of other things.

This statement is the linchpin of Jennifer's recusal reasoning.

From this statement, she concluded that the judge had prejudged her credibility as a witness, theatened her with a perjury charge if he found she lied about her involuntary and unintelligent execution of the agreement, and implied that her opportunity for custody of the child would be jeopardized. Whatever misgivings Jennifer or her counsel harbored regarding the portent of the judge's remarks, they were most likely internally generated. They surely were not a reasonable product of anything the judge said, other than the certainty that if she lied when she testified under oath there would likely be consequences adverse to her interests. That prediction can reliably be made as to any duplicitous party in a proceeding that the court finds to be lying. In this case, the judge's comments do not support an interpretation that he had a personal bias against Jennifer.

III.

We do not in any way condone Skeens' conduct on this record. We nonetheless are constrained to reverse and vacate that part of the judgment that assessed the

$150 sanction against him. The problem with the judge's ruling is that it does not have a full and complete procedural basis in the record to qualify as a proper civil contempt purging provision or as a Rule 1-341 sanction.

It is clear from the record that the judge did not intend to find Skeens in criminal contempt. When Skeens was brought by the Sheriff before the judge at the resumed 29 December hearing, the following revealing exchanges occurred:

> MR. SKEENS: Can I be advised of what I'm charged with?
>
> THE COURT: Failure to appear in court after I told you to be here sir.
>
> MR. SKEENS: Criminal or civil?
>
> THE COURT: Civil
>
> * * * * *
>
> MR. SKEENS: If I'm charged with a crime. I know I'm going to be charged with a crime. Criminal contempt, that's what I have been arrested for I assume.
>
> THE COURT: No, if it was criminal contempt I would have issued a bench warrant, not a writ of attachment.
>
> * * * * *
>
> MR. SKEENS: I was charged with having committed a criminal offense.
>
> THE COURT: You were charged with failing to appear sir. I fail to understand how you as an attorney having practiced in this court for a long time can decide that you are not going to show up in court when a case is scheduled sir.
>
> How did you make that determination?

MR. SKEENS: It was a civil hearing in a divorce case. If I choose not to appear, my client will suffer the consequences. You might enter an order for default against her and the agreement would be approved and made part of the final agreement. That's the worst thing that could happen if we failed to show up.

THE COURT: If she failed to show up, not if you failed to show up sir.

MR. SKEENS: I didn't commit any crime or do anything disrespectful to the Court.

If analyzed as a civil contempt, the judge's actions fall short on a number of counts. First, civil contempts are usually initiated by a private person, rather than the State. *Winter v. Crowley,* 245 Md. 313, 317 (1967). Despite Eason's request for a $225 "purge" of Skeens' "contempt" made during the morning session of the 29 December hearing, our review of the record compels us to conclude that it was really the trial judge who pursued the actions against Skeens. Moreover, it was the trial judge, nor Eason, who ordered a body attachment issued for Skeens. This suggests that the affront to the court, not Eason's inconvenience, was the primary motivation. Secondly, whether viewed as a direct or constructive civil contempt, the judge's Docket Entries/order (presumably signed on 29 December 1992, though undated) directing that a writ of attachment issue to have Skeens brought before the trial judge, missed the marks delineated by the P Rules. No recitation of the facts constituting the basis for the court's finding was contained there, or in the writ. Rule P 3(b). These documents would similarly fail to qualify as a show cause order pursuant to Rule P 4(b)(1). The process also contained other P Rule shortcomings, the further itemization of which serves no good purpose.

Finally, in awarding the monetary sanction to the benefit of Ray and/or his counsel, the court, among other things, could not have acted under the authority of Rule 1-341 because it failed to make required findings on the record. *See Inlet Associates v. Harrison*, 324 Md. 254 (1991), *Zdravkovich v. Bell Atlantic Tricon Leasing Corp.*, 323 Md. 200 (1991), and *Talley v. Talley*, 317 Md. 428 (1989). There were undoubtedly ways that the judge could have sanctioned Skeens for his conduct. We merely hold that, as shown by this record, the trial judge failed to observe the requirements to do so.

IV.

Supplementing the argument set forth in her brief as to why the trial judge erroneously dismissed her counterclaim, Jennifer's counsel asserted at oral argument before us that, unless her counterclaim was reinstated, the circuit court would have no basis to support its judgment, and future proceedings, regarding blood tests to determine paternity or to render decisions as to custody and child support. Noting that Ray's complaint contained no requests for such relief, Jennifer asserted that she and the child would be barred from bringing another action to adjudicate the issues affecting the child.

With the exception of her prayer for counsel fees, appellant's challenge to the dismissal of her counterclaim, if successful, seems largely a fruitless quest, as a practical matter, on this record. We have held that the grant of the divorce to Ray was proper. Each of Jennifer's other prayers for relief, save the award of counsel fees, was granted by the trial judge, in one fashion or another,

before he dismissed her counterclaim.[8] Moreover, Jennifer's custody of the child has not been contested by Ray.

The basis upon which the court acted in dismissing the counterclaim is revealed in the following colloquies from the 29 December hearing:

> THE COURT: You abandoned your right to pursue the counterclaim in the case because you chose not to appear.
>
> MR. SKEENS: No, I don't see the status of this litigation in that matter, because the matter of the counterclaim was not before the Court. The only thing before the Court were the exceptions.
>
> THE COURT: You excepted to the issue of the divorce, and I believe if you look at the rules, Maryland Rule 2-540, et cetera, it says that this court can overrule and sustain or can take new evidence and can have a full hearing on the matter.
>
> This court exercised its privilege under that rule to do the latter. You chose not to appear. Your client chose not to appear is the salient issue. Your client chose not to contest, not to offer any additional evidence, not to do anything in this case.
>
> MR. SKEENS: The record is clear that the only matter pending before Your Honor this morning was to put on testimony, particularly my client, to determine whether or not that agreement should be made a part of the final decree that would be entered in this case, and that was the only thing that was before the Court today. The rest of the case Your Honor took under advisement.

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[8] It is also conceivable that Jennifer's prayer to have the agreement declared invalid could still remain for consideration. Although it was not incorporated in the divorce decree, the agreement remains potentially capable of enforcement as a contract between the parties. What the practical purpose of such a determination might be remains to be seen.

THE COURT: As far as the rest of the matter, everything that you excepted to was before this court.

MR. SKEENS: The counterclaim?

THE COURT: Everything that you excepted to was before this court. When you except and you put your exceptions in writing, everything that you except to is before the Court.

MR. SKEENS: What happened before Master Lancaster, I excepted to all of that.

THE COURT: Then all of that was before the Court.

MR. SKEENS: That's correct.

THE COURT: And the Court found that you abandoned your right to proceed on your counterclaim in that you and your client failed to appear. You offered nothing. The case was called, the Court was ready, willing and able to handle the matter . . ."

* * * * *

THE COURT: All right. One other thing, Mr. Eason, I think Mr. Skeens is right to this extent. I found this morning that he abandoned his counterclaim in this particular case, but I think that has to be included in the final decree. You have to include the fact that the Court finds that the defendant has abandoned the counterclaim.

MR. SKEENS: My position is I didn't abandon anything, not even the exceptions. I didn't abandon them either.

THE COURT: I know what your position is, Mr. Skeens.

It is true, as Jennifer contends, that the procedural posture of this case before the trial judge when judg-

ment was entered precluded him from dismissing her counterclaim pursuant to the authority of several arguably applicable rules of procedure. Under Rules S73 and 2-613, the judge failed to observe the requirements to properly recognize a default on Jennifer's part. If viewed as an attempt to render a voluntary dismissal pursuant to Rule 2-506, as interpreted by *Owens-Corning v. Fibreboard,* 95 Md. App. 345 (1993), the judge's action could not be sustained because the facts of the case *sub judice* are so different from those that served to support the unusual result in *Fibreboard.* Lastly, the court's authority to dismiss a claim for lack of prosecution under Rule 2-507 was inapplicable to the facts of this case. *See Powell v. Gutierrez,* 310 Md. 302, 308 (1987).

Notwithstanding the shortcomings of the dismissal when measured against the foregoing Rules, we are of the opinion that the judge's decision to dismiss the counterclaim, certainly as to the issues that do not pertain to the child's interests, was sustainable on another basis. His characterization of Jennifer's abandonment of the counterclaim is, in fact, a determination that her personal claims for relief suffered from a failure of proof. It is an ancient axiom that averments in a declaration must be supported by proof. *Perry v. House of Refuge,* 63 Md. 20 (1885). If there is a failure of proof, the claimant must be "non-suited" because that failure defeats the right to recover. *County Commissioners v. Wise,* 75 Md. 38, 43 (1891); *Wilson v. Wilson,* 37 Md. 1, 18 (1872). Whether Jennifer's failure to offer proof as to her personal claims resulted from deficiencies identified following an evidentiary hearing, or from her refusal to attend a hearing and give evidence in support of her claims, is of no consequence to our holding in this regard.

The court properly dismissed her counterclaim as to those personal prayers for relief requesting that the divorce be granted to her, she be awarded counsel fees, and the agreement declared null, void, and unenforceable.

Jennifer's claims on behalf of the child, Kyrie Inez, stand on a different footing. The court has accepted jurisdiction over the questions of paternity, custody, and potential child support. In an effort to insure that the court has a fully developed record before it when it addresses those issues, we deem it a better course of action that Jennifer's status as a potentially adversarial party to Ray's position, whatever that may be, be restored. This will tend to maximize the likelihood that all of the evidence, and reasonable inferences to be drawn therefrom, will be fully explored. To that end, we are of the opinion that Jennifer's counterclaim relative to those matters affecting the best interest of the child should be reinstated.

JUDGMENT REVERSED IN PART
AND AFFIRMED IN PART;
CASE REMANDED TO THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION; COSTS TO BE
PAID ONE-HALF (½) EACH BY
APPELLANT JENNIFER WESTFALL
AND APPELLEE.

APPENDIX D

CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

VIVIAN JENKINS
CLERK OF THE CIRCUIT COURT
COURTHOUSE
UPPER MARLBORO, MD 20772-9987

CASE NUMBER: CAD 92–09193

NON-AFDC
WRIT OF BODY ATTACHMENT

WESTFALL VS WESTFALL

STATE OF MARYLAND, PRINCE GEORGE'S COUNTY TO WIT:

TO SHERIFF OR ANY PEACE OFFICER:
YOU ARE HEREBY COMMANDED TO ATTACHED THE BODY OF

EDWARD JOHN SKEENS
BELTWAY PLAZA 36
4710 AUTH PLACE SUITE 740
SUITLAND, MD 20746

DOB: RACE: SEX: SSN:

( ) FOR FAILURE TO OBEY A SUBPOENA

( ) FOR FAILURE TO COMPLY WITH A COURT ORDER.

( ) OTHER (STATE REASONS)_____
_____

AND YOU ARE FURTHER DIRECTED TO:

( ) IMMEDIATELY TAKE THIS PERSON BEFORE THIS COURT IF IN SESSION, AND IF NOT IN

SESSION THE PERSON SHALL BE TAKEN BEFORE A JUDICIAL OFFICER OF THE DISTRICT COURT.

( ) PAYMENT IN LIEU OF TO OCSE.

(x) OTHER (EXPLAIN) NO BOND RETURNABLE TO JUDGE MISSOURI

(x) BOND DENIED ( )BOND SET ( )SURETY BOND

JUDGE JUDGE MISSOURI

WITNESS THE HONORABLE ERNEST A. LOVELESS, JR., CHIEF JUDGE OF THE SEVENTH JUDICIAL CIRCUIT OF MARYLAND.

DATE ISSUED: 12/29/92 /s/ Vivian Jenkins
CLERK

RETURN

DATE _____ COPY OF BODY ATTACHMENT SERVED ON PERSON.

( )ON BAIL AMOUNT $_____POSTED BY_____

( ) DEFENDANT CUSTODY

_____

JUDICIAL OFFICER PHONE NO

_____

SHERIFF OR PEACE OFFICER

NOTE: The original document additionally contained the prominent handwriting across the face:

Recalled
12/29/92
William D. Missouri